**ENG NGAK HUA & ORS.**

**v.**

**AHMAD NORDIN HJ. MAZLAN & ANOR.**

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. P. 61 OF 1983]
25 APRIL 1984

***TORT:*** *Nuisance - Liability - Whether vehicle an obstruction - Whether defendant at fault - Negligence - Liability - Presumption against defendant - Whether rebutted - Contributory negligence - Whether all plaintiffs liable - Apportionment of blame*

***DAMAGES:*** *General and special damages - Dependancy claim.*

The 1st and 2nd plaintiffs and a third person were in a car driven by the 1st plaintiff on the Kuala Selangor/Sabak Bernam trunk road when they crashed into the rear of a stationary lorry at 12.30 a.m. on 29 June 1982. The lorry was at that time under the control of the 1st defendant. The third person in the car died and the 1st and 2nd plaintiffs injured as a result of the accident. The 3rd to 8th plaintiffs were the dependants of the deceased. The plaintiffs claimed that by leaving the lorry parked on the road without any lighting and without giving due warning to approaching traffic of its presence, the defendants were guilty of negligence or, alternatively, of nuisance. The 1st defendant on the other hand claimed that he had to park his lorry the way he had because his lights and engine had suddenly malfunctioned and as he was afraid that the fully laden lorry would overturn if he tried to park it on the side table as the ground was wet and soft. He also claimed that he had placed a reflectorised safety triangle 150 feet from the rear of the lorry and also had the attendant flashing a torchlight at the rear.

**Held:**

**[1]** The defendants were not liable in nuisance. Though the vehicle was an obstruction and a danger on the road, the obstruction was not due to the fault of the 1st defendant.

**[2]** The defendants were however liable in negligence. The 1st defendant had not taken all steps necessary to warn approaching vehicles of the presence of his parked lorry. The presence of an unlighted vehicle on the road is *prima facie* evidence of negligence on the part of the driver and it is for him to explain how it came to be unlighted and why he could not move it out of the way or give warning to oncoming traffic.

**[3]** However, the 1st plaintiff was equally to blame for the accident and liability must be apportioned 50:50 but between the defendants and the 1st plaintiff only, the other plaintiffs remaining entitled to recover the whole of their damages.

**[4]** The orders regarding damages to be as follows:

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|---|---|---|
| (i) 1st plaintiff | - RM4,500 | - general damages with interest |
| | - RM1,060 | - special damages with interest. |
| (ii) 2nd plaintiff | - RM4,000 | - general damages with interest. |
| | - RM 690 | - special damages with interest. |
| (iii) 3rd to 8th plaintiffs | - RM152,102 | - dependancy claim with interest on RM16,800. |

(iv) 3rd plaintiff - RM2,000 - funeral expenses with interest.

*[Judgment and costs to plaintiffs.]*

**Cases referred to:**
*Maitland v. R.T. & J. Raisbeck & Hewitt Ltd. [1944] 2 All ER 272*
*Parish v. Judd [1960] 3 All ER 33*
*Dymond v. Pearce and Ors. [1972] 1 All ER 1142*
*Hill-Venning v. Beszant [1950] All ER 1151*
*Oli Mohamed v. Keith Murphy & Anor. [1969] 2 MLJ 244*

*For the plaintiffs - Segaram*
*For the defendants - Manjeet Singh Dhillon*

**JUDGMENT**

**Siti Norma Yaakob J:**

One life was lost and two other persons were injured in this accident that occurred near Simpang Lima on the Kuala Selangor/Sabak Bernam trunk road at 12.30 a.m. on 29 June 1982, between a car driven by the 1st plaintiff and an unlighted stationary lorry with a maximum permissable weight of 8 tons which was under the control of the 1st defendant. The 1st plaintiff had, as his passenger, the 2nd plaintiff who was seated directly behind him in the back seat and the deceased who was seated next to him in the front. All three had left Kelang at about 11.00 p.m. that night on their way to their homes in Sungei Besar after having transacted some business there.

At about the same time too, the 1st defendant was leaving Sekinchan for Sungai Besar in his lorry, BM 2093 which belonged to the 2nd defendant and which was fully laden with padi and seated next to him, was his attendant. On arrival at Simpang Lima which is a straight stretch for about 700 to 800 feet, the lights of the lorry malfunctioned as did the engine, forcing the 1st defendant to leave the lorry parked right in the middle of the road and occupying its correct half of the road with its nearside front and rear tyres only 8" from the left edge of the road and its off-side front and rear tyres only 6" from the centre white line; leaving no room at all for 2 cars to pass each other safely and clearly it was an obstruction to traffic coming from the same direction as the 1st plaintiff.

It was whilst so parked that the 1st plaintiff arrived at the scene and unaware of its presence, he ploughed right into the rear of the lorry thereby causing the death of the deceased and injuring the 2nd plaintiff and himself. The present action is brought by the 1st and 2nd plaintiffs to recover damages for the injuries they sustained and by the 3rd to the 8th plaintiffs as dependants of the deceased. They claim that by leaving the lorry parked without any rear lights on the road which had no lighting and without giving due warning to approaching traffic of its presence, the defendants are guilty of negligence or alternatively of nuisance.

The 1st plaintiff, PW5, testified that before the impact, he was driving at about 50 m.p.h. and ahead of him at a distance of about 100 to 200 feet away, he saw the strong lights of an oncoming lorry. Although the strong lights blinded him, he did not stop but instead reduced his speed and dimmed his own headlamps to warn the lorry driver to do likewise. The lorry driver however ignored the hint but proceeded on and passed the plaintiffs' car safely. It was only after that the 1st plaintiff perceived the presence of the defendants' lorry on his side of the road but by that time it was too late to take any evasive action and he smashed right into the rear of the parked lorry and the impact caused the back portion of his car to be turned at an angle as shown in AB5.

The 2nd plaintiff, PW7, corroborated PW5's evidence on all material particulars and both confirmed that the parked lorry had no rear lights, they did not see any reflectorised safety triangle on the road or the attendant flashing a torchlight at the rear of the lorry.

The driver of the lorry, DW2, on the other hand testified that before he left Sekinchan at about 11.00 p.m. that night, he checked all the lights of the lorry and found them to be in working condition. However, after 40 miles of driving the lights suddenly went off and upon investigation, he found that some wires had got burnt. At about the same time, the engine also stalled and he attributed the cause of this to the inability of the diesel to flow to the engine, a fault which was in no way connected with the burnt wires. Although there was a side table, he chose not to drive the lorry to it as the ground was wet and he was afraid that his overladen lorry would overturn in the soft ground. He left the lorry parked as it was on practically the entire part of its side of the road. However, realising that it was an obstruction, he placed the reflectorised safety triangle which he is required, by law, to carry in his lorry, 150 feet away from the rear of the lorry and also had the attendant at the rear of the lorry flashing a torchlight to give advance warning of the stationary lorry to vehicles approaching from the rear. After having done that, he went to the front of the lorry and tried to repair the wires and it was whilst he was so engaged that he heard the sound of the plaintiff's car smashing into the rear of the lorry.

The officer who did the initial investigations into this case, DW1, confirmed there were no street lamps at the scene of the accident and he corroborated DW2's evidence that the side table was wet and soft and that he found the reflectorised safety triangle broken and the broken fragments form part of other broken fragments found on the road immediately to the rear of the lorry as shown on the sketch plan, AB3.

On the question of liability, I shall first of all consider whether the plaintiffs' action can be founded on the tort of nuisance. The law as to what constitute a nuisance is well illustrated in the following 3 cases.

(1) *Maitland v. R.T. & J. Raisbeck & Hewitt Ltd.* [1944] 2 All ER 272.

(2) *Parish v. Judd* [1960] 3 All ER 33.

(3) *Dymond v. Pearce & ors.* [1972] 1 All ER 1142.

In *Maitland's* case, Lord Green MR enunciated the law as follows:

> Every person who uses the highway has to exercise due and proper care. He has a right to use the highway and, if something happens to him which in fact causes an obstruction to the highway but is in no way referable to his fault, it is quite impossible, in my view, to say that *ipso facto* and immediately a nuisance is created. It would be obviously created if he allows it to be an obstruction for an unreasonable time or in unreasonable circumstances, but the mere fact that it has become an obstruction cannot turn it into a nuisance. It must depend on the facts of each case whether or not a nuisance is created. If that were not so, it seems to me that every driver of a vehicle on the road would be turned into an insurer in respect of latent defects in his own machine.

This ennunciation of the law was followed by Edmund Davies J in *Parish's* case when His Lordship stated that:

> The mere fact that an unlighted vehicle is found at night on a road is not, in my judgment, sufficient to constitute a nuisance. First, in order that a nuisance may be constituted, it must be shown not merely that the vehicle was an obstruction on the road but that it was a danger on the road. Secondly, in order that, if it be a nuisance, it may be an actionable nuisance, it must be shown either that the vehicle became unlighted by reason of some fault on the part

> of the person responsible for the vehicle, or that, assuming that it initially became unlit without any fault on the part of the person responsible for the car, nevertheless he thereafter was guilty of some fault.

In *Dymond's* case, the same Judge went further to explain that fault is implicit and liability incontestable if the nuisance has been deliberately created giving rise to danger to road users.

Applying the above tests to the facts of the case before me, I ask myself the following questions. Why did the defendants lorry become unlighted in the first place and why did the engine stall? Was it due to DW2's fault? DW2 has explained that before leaving Sekinchan that night, he had checked the lights of the lorry and found them to be in order and there was no indication that they might malfunction. Although he had experienced the same problem once before, he had had the lights repaired since and had been using the lights for his night driving without any problem for one month before this accident. The fact that the wires got burnt again could not be held against him as he is not a mechanic who could have detected the probability of the same problem recurring again and as such it was not his fault when the lights went out. Again there was independent testimony from DW1, that unlike PW5's car, the lorry could not be driven away from the scene of the accident the same night and he had to wait for daylight before he could get a crane to tow it to the police station. All this points to the fact that the engine of the lorry had also malfunctioned a factor which could not possibly have been anticipated by DW2 as likely to happen as it was most unlikely that he would want to be caught stranded in the middle of the night on a lonely and dark road. Since fault could not be established, the claim on nuisance will not lie as the defendants were not responsible for creating the danger in the first place. In this case, the danger was forced on them.

Turning to the claim for negligence, the law on this is well stated by Denning LJ in the case of *Hill-Venning v.Beszant* [1950] All ER 1151 as follows:

> The presence of an unlighted vehicle in a road is *prima facie* evidence of negligence on the part of the driver, and it is for him to explain how it came to be unlighted and why he could not move it out of the way or give warning to oncoming traffic.

In the same case, Cohen LJ further explained that what is reasonable to do must depend on the circumstances of each case. Thus to rebut the presumption of negligence raised against him, DW2 must show that he had done all that is reasonably necessary and expected of him to warn approaching vehicles of the obstruction caused by his unlit lorry parked on the dark road. As I have already stated above, the cause of the lights suddenly going off and the failure of the engine are no fault of DW2 and in this respect and contrary to the plaintiff's objection, I do not consider it necessary for DW2 to adduce any evidence on the maintenance of the lorry. If the plaintiffs had really required this evidence, they could easily have obtained that independent testimony from the Registrar and Inspector of Motor Vehicles who examined the lorry after the accident and who had reported on his findings. DW1 who was subpoenaed by the plaintiffs originally, confirmed that the lorry was so examined but he did not have such a report in his possession and this may well be due to the fact that he had already retired from the police force but this should not have prevented the plaintiffs from obtaining the report and satisfying themselves as to the cause of the failure to the lorry's lighting system and engine and which I am sure, would be disclosed by such a report. Since they have not done so, I am only left to decide on facts adduced before me at the trial.

Realising that the lorry was an obstruction, DW2 had placed a reflectorised safety triangle 150 feet away from the rear of the lorry. The fact that there was a reflectorised safety triangle at the scene cannot be doubted as DW1 saw fragments of it together with the other fragments

of glass and metal at the rear of the lorry. What was disputed by the plaintiffs was that it could not have been at the distance of the statutory requirement of 150 feet away from the rear of the lorry as the broken pieces were found too close to the lorry. In this respect, I have also to consider PW5's manner in driving his car. According to him, as he was proceeding at about 50 m.p.h. and was blinded by the lights of the oncoming lorry, he had slowed down, dimmed his own head lamps but did nothing else. Even though the road was illuminated by the strong lights of the oncoming lorry as well as by the head lamps of his own car, he was unable to perceive the presence of the defendants' lorry on the road until it was too late. This can only mean that he must have been speeding and had not kept a proper look out. My finding on this is based on the following facts. As it was already past midnight and there was no speed limit imposed in that area, in all probability, PW5 must have been speeding to get home and that he was driving more than 50 m.p.h. than he dared to admit. There was no telltale mark on the road to show that he had braked and on his own admission, he only slowed down after he was blinded, dimmed his own head lamps and did nothing else. Even assuming for one moment that the reflectorised safety triangle was placed at the distance less than 150 feet from the rear of the lorry, he did not even see it at that distance and this can only mean that he was driving too fast and did not keep a proper look out. Another evidence of speed is the extent of the damage to the motor car which is very extensive as can be seen from the photograph, AB 6E. Thus driving at a speed of more than 50 m.p.h. he must have knocked the reflectorised safety triangle down, hurled it forward to leave its broken pieces along with the other broken fragments at the rear of the lorry. As a long distance lorry driver whose work entails driving mostly at night, it is most unlikely that DW2 could have risked placing the reflectorised safety triangle at a distance less than 150 feet from the rear of the lorry and to that extent, I accept his evidence that he had placed the triangle at the required statutory distance.

I also accept DW2's explanation that he could not risk parking the lorry at the side table as he feared that his heavy laden lorry would overturn in the soft ground. I found corroborative evidence of this from DW1 and from the documentary exhibits. DW1 had testified that although he could not recall whether it rained during the day, he found the side table damp and the ground soft. From the photographs exhibited, the parked lorry hardly budged on impact whereas it pushed the back portion of PW5's car at an angle, thus tending to show that the lorry was too heavy to be pushed forward even on impact.

I now come to the other action taken by DW2 to minimise the danger which his parked unlit lorry had caused and that is the presence of his attendant, DW3, at the rear of the lorry, flashing a torchlight to warn traffic of the presence of the lorry. It is not disputed that DW2 carried only one torchlight in his lorry and there was evidence from DW3 that it was impossible for DW2 to carry any repair work at the front of the lorry without the aid of some light as there was no street lamps and the area was very dark. Yet DW2 insisted that he was able to do so without the aid of any light. Then again there was a very material inconsistency in their evidence when they testified as to the time DW2 took trying to repair the burnt wires. According to DW2, he tried to do so for 10 minutes whilst DW3 testified that DW2 was all the time at the front of the lorry repairing the wires and this took about 1 hour. Reflecting on DW2's earlier evidence, he had testified that he left Sekinchan at about 11.00 p.m. and after about 40 minutes of driving the lights of the lorry suddenly went off and the engine refused to start. Thus, he would have reached the accident area round about midnight and since the accident happened at about 12.30 a.m., DW3's evidence as to the time taken by DW2 to mend the wires would be the more approximate and probable time that DW2 took to

tend to all the necessary repair work. In this respect, it is hardly improbable that DW2 would be able to do any form of repair work for about 1 hour without the aid of any lights and yet according to DW3, he was at the front of the lorry all the time and that he was still there at the time of the accident and neither PW5 nor PW7 saw anybody flashing a torchlight at the rear of the lorry. The sum total of all these evidence is that in all probability, DW3 could not have been flashing the torchlight from the rear of the lorry as DW2 must have been using it to assist him in the repair work he was doing at the front of the lorry. From this it follows that DW2 had not taken all steps necessary to warn approaching vehicles of the presence of his parked lorry and to that extent, he has not rebutted the presumption of negligence. However, when considering the extent of his liability, I have to take into account the conduct of PW5 in driving his car. As I have already held above, he was taking unnecessary risks in driving his motor car well beyond 50 m.p.h. and since he did not keep a proper look out, he must also bear some part of the blame for this unfortunate accident. From the facts and the circumstances of this case, the cause of this accident was due on the part of PW5 for not keeping a proper look out and on the part of DW2 for failing to take the necessary steps to warn PW5 of the presence of his unlit stationary lorry. That being the case, I hold that both are equally to blame for this accident and to that extent, I apportion liability at 50:50.

Although liability has been apportioned between 1st plaintiff and the defendants, this does not mean, following the decision of *Oli Mohamed v. Keith Murphy & Anor.* [1969] 2 MLJ 244 that it can be extended to PW7 and the deceased's dependants, the innocent victims to this accident. As far as their claims are concerned, they are entitled to recover the whole of their damages awarded in this case.

Since general and special damages for the 1st plaintiff have been agreed at RM9,000 and RM2,120 respectively based on 100% liability, these amounts will accordingly be halved, following my finding as to his share of the blame.

The 2nd plaintiff suffered cerebral concussion and 2 lacerations measuring 8 cm. and 4 cm. on the right frontal region of his scalp and right supra-pubic region. He was awarded initially at the General Hospital, Kelang, but after his discharge, when he experienced severe headaches and giddiness, he sought medical treatment at the General Hospital, Kuala Lumpur, where he was treated as an out patient for 2 weeks. Presently he claims that although the headaches have improved as they do not come too frequently, they still persist but there was no medical evidence to support this. For his injuries based on 100% liability, I award a sum of RM4,000 by way of general damages. For special damages he has claimed:

(1) a sum of RM40 being fees paid for his medical report which is not disputed by the defendants and which is allowed.

(2) a sum of RM60 as damages to clothing. As there was no proof of this, I disallow this claim.

(3) a sum of RM100 as travelling expenses for which I allow only RM50.

(4) a sum of RM4,800 being loss of 6 months' income as a boat repairer at RM800 per month. I have only PW7's word that he earned RM800 per month as a boat repairer and that he was incapacitated for 6 months. As with evidence of earnings, plaintiffs do tend to inflate the figures of their earnings and since in this case there was no supporting evidence, I consider a sum of RM600 as being a more reasonable figure and grant him a period of 1 month as total incapacitation. So for loss of earnings alone, I award the 2nd plaintiff a sum of RM600.

(5) a sum of RM200 as extra nourishment and food. As this does not necessarily arise, I disallow this claim.

On the whole then, I award the 2nd plaintiff RM690 by way of special damages.

Coming to the dependancy claim, the dependants of the deceased are the 3rd to the 8th plaintiffs and they are his widow, his 3 infant children aged 5, 4 and 2 and his parents aged 52 and 50 at the time of death. The deceased was 25 years old then and he earned a livelihood as a butcher, earning an average of RM1,800 a month out of which he contributed RM1,400 for the upkeep of his family and parents. As with most cases of this nature, there was no satisfactory proof of earnings and I had only the widow's testimony on this. Bearing in mind the deceased's station in life, the needs of his young family and aged parents, I consider a sum of RM800 per month would be sufficient to maintain a family of 6 people. Up to the date of trial there has been a lapse of 1 year and 9 months since the accident and for the pre-trial period, the dependancy loss is calculated at 21 x RM800 = RM16,800. Being a self-employed man, I would expect the deceased to work until 65 years old and since he would have been 27 today, he would still have at least another 38 years of working life. Taking 1/3 away for contingency, I would give him another 25 years of purchase and for this period at the rate of RM800 per month, the Annuity Table comes out with a figure of RM135,302 (to the nearest dollar).

The widow of the deceased, who is the 3rd plaintiff also claims funeral expenses which has been agreed between the parties to be at RM2,000.

On the whole then, there will be judgments:

(1) to the 1st plaintiff in the sum of RM4,500 general damages, interest at the rate of 6% per annum from date of service of writ to date hereof, RM1,060 special damages, interest at the rate of 3% per annum from date of accident to date hereof.

(2) to the 2nd plaintiff a sum of RM4,000 general damages, interest at the rate of 6% per annum from date of service of writ to date hereof, RM690 special damages, interest at the rate of 3% per annum from date of accident to date hereof.

(3) to the 3rd, 4th, 5th, 6th, 7th and 8th plaintiffs in the sum of RM152,102 being the dependancy claim interest at the rate of 3% per annum on RM16,800 from date of accident until date hereof.

(4) to the 3rd plaintiff for the agreed sum of RM2,000 as funeral expenses, interest at the rate of 3% per annum from date of accident to date hereof, and

(5) costs to the plaintiffs.

Also found at [1984] 2 CLJ 233